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88-288

Supreme Court, U.S.
FILED
AUG 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES

# SUPREME COURT

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NO.

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STEVEN J. DUPUIS, ET AL

Respondents

*VERSUS*

THOMAS R. BECNEL, ET AL

Petitioners

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ON PETITION FOR WRIT OF CERTIORARI AND MANDAMUS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1.

DOES A POLICY AGAINST PIECEMEAL APPEALS OVERRIDE A POLICY AGAINST PIECEMEAL LITIGATION WHEN A DISTRICT COURT HAS BASED ITS REFUSAL TO ABSTAIN ON OBVIOUSLY ERRONEOUS DETERMINATIONS AND THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT HAS NEVER BEEN CONSIDERED?

2.

WHEN PARTIES HAVE LITIGATED THE SAME ISSUES IN STATE COURT FOR TWO (2) YEARS RESULTING IN A RECORD OF ONE THOUSAND TWO HUNDRED NINETY THREE (1,293) PAGES; DEPOSITION TESTIMONY OF ONE THOUSAND EIGHT HUNDRED FIFTY (1,850) PAGES AND LITIGATION COST TO THE DEFENDANTS OF SIXTEEN THOUSAND DOLLARS ($16,000.00), IS ABSTENTION APPROPRIATE WHEN THE SAME ISSUES ARE PRESENTED IN FEDERAL DISTRICT COURT?

## PARTIES TO THE PROCEEDING

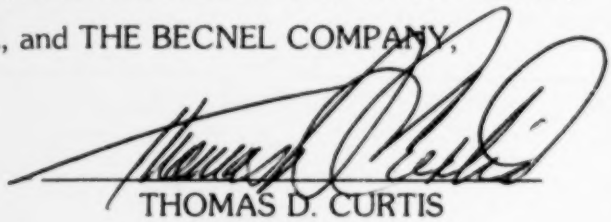
Pursuant to Rule 21.1(b) The Becnel Company and Thomas Becnel certify that the following are parties to the proceedings:

STEVEN J. DUPUIS, SR.,
STEVEN J. DUPUIS, JR., IRREVOCABLE INTER VIVOS TRUST,

JAMES H. DUPUIS, SR.,
JAMES H. DUPUIS, JR., IRREVOCABLE INTER VIVOS TRUST,

JOHN W. DUPUIS, III,
JOHN W. DUPUIS, IV, IRREVOCABLE INTER VIVOS TRUST,

THOMAS R. BECNEL, and THE BECNEL COMPANY,



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## OPINIONS OF THE COURTS BELOW

1.

The United States District Court for the Western District of Louisiana entered an unreported decision on January 8, 1988 in the matter captioned Steven Dupuis, et al v. Thomas R. Becnel, et al bearing docket number 87-1781-0 denying a Motion for Abstention.

2.

The Opelousas Division of the United States District Court for the Western District of Louisiana entered an unreported decision on January 25, 1988 an amendment to that decision on January 27, 1988 denying the Motion for New Trial and certifying the matter for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

3.

The United States Court of Appeals for the Fifth Circuit entered a decision in the matter captioned Steven Dupuis, et al v. The Becnel Company, et al bearing appeal docket number 88-9017 on April 6, 1988 denying the petition for leave to appeal and alternative writ of mandamus.

4.

The United States Court of Appeals for the Fifth Circuit entered a decision in the matter captioned Steven J. Dupuis, et al v. The Becnel Company, et al bearing docket number 88-9017 on May 3, 1988 denying the Petition for Rehearing.

## JURISDICTION

This matter was brought in the Federal District Court alleging jurisdiction under 15 U.S.C. Section 77b; 15 U.S.C. Section 78 aa; Rule 10b-5; 18 U.S.C. 1964(c). Claims were based upon alleged violations of Federal Securities Laws and pendent State claims.

There are no constitutional provisions, statutes, ordinances or regulations involved. Jurisdiction lies in the United States Supreme Court pursuant to 28 U.S.C. 1254 and 28 U.S.C. 1651. Jurisdiction of the United States Supreme Court to consider grants and denials of Motions for Abstention has been set forth in **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 127 (1983) and **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949).

## CONCISE STATEMENT OF THE CASE

The United States Supreme Court has determined that an immediate appeal is appropriate when a lower Court denies or grants a Motion to Abstain or Stay based upon parallel state litigation. In **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 127 (1983), the Supreme Court discussed reviewability of an order relating to a request for stay in view of pending State litigation. A party sought review by alternative routes. A notice of appeal was filed pursuant to 28 U.S.C. 1291 as opposed to 1292. Review was also sought under 28 U.S.C. 1651; page 933.

The Supreme Court found that the Stay Order was final for purposes of appellate jurisdiction; page 933. **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949) was cited during the course of the opinion; page 934. The latter case noted the applicability of 28 U.S.C. 1292 to appeals from interlocutory orders. On page 1225 of the **Cohen** decision it is noted that 28 U.S.C. 1292 was not material to that case but it is a provision which is made to allow appeals from orders other than final judgments which have a final and irreparable effect on the rights of the parties.

In **Cohen,** it was determined that a small class of decisions exist that determine matters of right separable from, and collateral to, rights asserted in the actions which are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated; pages 1225, 1226.

**Moses** interprets the **Cohen** decision on page 934 as encompassing certain factors of importance as follows:

> To come within the small class of decisions excepted from the final judgment rule by **COHEN** the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and be effectively unreviewable on appeal from a final judgment.

Our case definitely fits within this class. The rulings have conclusively determined that the lower court will not abstain or stay the action. This has been done even though the State litigation has now been ongoing for more than two (2) years. The underlying issues and the cause of action are the same. Seventeen (17) months expired between the time that the State petition was filed and the filing of the Federal petition.

The question of propriety of abstention or stay is totally separate from the merits of the claim and if the Court allows this matter to proceed to judgment, there is no relief that can be obtained on appeal. Thus, our rights are irreparably and finally determined.

The United States Court of Appeals for the Fifth Circuit has previously recognized the reviewability of a ruling on a request for abstention. **ACF Industries, Inc. v. Guinn,** 384 Fed.2d 15 (5th Cir. 1967) reversed a decision by the District Court refusing to stay a proceeding in Texas pending the determination of similar litigation in Kansas. At page 18, footnote 9, the Fifth Circuit determines that when a lower court refuses to issue an order pursuant to 28 U.S.C. 1292(b), mandamus may be issued to review a District Court's grant or refusal of a stay of proceedings. The same is true in other circuits, see: **Filtrol Corporation v. Kelleher,** 467 Fed.2d 242, 244 (9:h Cir. 1973); **Texaco v. Borda,** 383 Fed.2d 607, 608 (3rd Cir. 1967).

A complaint was initially filed by the plaintiffs against the defendants in the Fifteenth Judicial District Court for the State of Louisiana on December 31, 1985. This State petition formed part of the record below and is appended hereto as Exhibit E. Paragraphs 3 and 4 of Exhibit E reveal that The Becnel Company and Thomas Becnel are alleged to be liable to the plaintiffs for willful misconduct, gross negligence and/or intentional breach of contractual, legal and/or fiduciary obligations as well as alleged deceit, false misrepresentations, artifice and/or concealment for matters arising from the operation and formation of a limited partnership. Paragraph 8 alleges that these actions have violated State and Federal laws. Subparts of that paragraph set forth claims of false and misleading statements to the plaintiffs as inducements to enter a partnership on June 21, 1981; false and misleading statements concerning contributions, activities, financial rewards and detrimental reliance; perpetuation of these activities to induce the formation of the partnership and continuation of the partnership.

Subsequent paragraphs detail the alleged misdeeds. Paragraphs 10 through 13 allege that the plaintiffs made the contribution required for entry into the partnership. This was land. They received a priority distribution right for this contribution. However, claim is made that the defendants failed to make their contribution which was to be know-how, development, leasing and management together with certain small monetary contributions.

Paragraphs 14 through 16 state that the defendants made use of false or misleading pro formas or projections of significant spendful income to secure plaintiffs' entry into the partnership. Supposedly, none of the projections reveal that payments could be made for management, leasing or loan commitments. Exorbitant charges were allegedly paid for these services to the defendants in companies which they owned or controlled so as to deprive the plaintiffs of disposable earnings all of which was used to obtain economic advantage over the plaintiffs; paragraphs 19 and 20.

Paragraph 21 sets forth a list of alleged transgressions. These include failure to pay capital contributions; failure to contribute know-how, development, construction, management, leasing, plans, building contracts, commitments and options; failure to spend funds solely for partnership purposes; causing contracts to be entered with themselves and those they control at exorbitant rates; failing to keep books and account to the plaintiffs; admission of new partners; breaches of fiduciary, contractual and legal obligations.

Then, paragraphs 22 through 24, in a general fashion, once again set forth claims of mismanagement, failure to disclose conflicts of interest, failure to adequately advise, violation of partnership duties, failure to account, willful misconduct, gross negligence and intentional breaches of duty.

Paragraphs 27 through 29 state that the defendants made misrepresentations in order to deceive and manipulate the plaintiffs. This was done through a device, scheme or artifice by means of misrepresentations of material facts and omissions to provided material facts necessary to make the statements understood under the circumstances in which they were made. Paragraph 31 alleges that the defendants knew or in the exercise of reasonable care could have known the untruths or omissions.

Plaintiffs seek the return of improperly paid funds plus interest; court appointment of a manager of the partnership; court appointment of a special master to perform an accounting; withdrawal from the partnership; return of the value of their investment plus interest and attorney's fees; dissolution and liquidation of the partnership and damages including treble damages.

By order dated January 3, 1986 appearing at the foot of the State Court petition, the Fifteenth Judicial District Court assumed jurisdiction over the partnership assets and agreed to make a determination of the interim relief demanded by the plaintiffs.

On August 19, 1987, the same plaintiffs sued the defendants herein based upon the same allegations in the United States District Court for the Western District of Louisiana. A copy of that petition is appended hereto as Exhibit F. Although the form is somewhat different and the order of presentation is changed, the claims are the same. According to that petition:

> The defendants approached the plaintiffs with a development plan. Becnel was to have the know-how to develop, construct, finance, lease and manage the project; paragraph 6-7. Projections of profits were provided with assertions that the project would generate significant income and the plaintiffs were to receive a priority distribution right; paragraphs 8-9. Great trust and confidence was placed in the defendants; paragraphs 10-11. The partnership was formed but the defendants failed

to make their capital contribution; paragraphs 12-13. The defendants admitted new partners and paid unauthorized management, commitment and leasing fees which deprive the plaintiffs of earnings; paragraphs 15-16. Defendants diverted a tenant and demanded waiver of the preferential payment provision; paragraphs 17-18. Defendants made misrepresentations, misleading statements and omitted facts in that the investment has not produced a reasonable return, income was diverted, defendants' contributions were not made, defendants did not provide accounting, defendants paid unauthorized management, leasing and commitment fees; pro formas and projections were false and misleading, the defendants did not have the skill and know-how claimed, defendants breached fiduciary duties; paragraph 19.

Several general paragraphs then followed setting forth the relief demanded. They seek the return of their consideration, an accounting, damages, interest, attorney's fees and treble damages.

The claims are the same. The underlying allegations are the same. Relief sought is the same except that the plaintiffs have additionally sought supervised dissolution and liquidation of the partnership in State Court. To that end, the State Court has assumed jurisdiction over the partnership assets. The State claim alleges breaches of State and Federal law. Federal claim alleges breaches of Federal and State law.

During the seventeen and one-half (17½) month period between the filing of the State claim and the filing of the Federal claim much has occurred in the State Court litigation. Exhibit H appended hereto, is the appendix of the record on appeal. It reveals that the record on appeal in the State matter as of June, 1987 consisted of one thousand two hundred ninety three (1,293) pages of pleadings, motions, documents and orders. The Clerk's cost sheet is appended as Exhibit G and reflects cost advanced in the State litigation of SEVEN THOUSAND ONE HUNDRED THIRTY EIGHT DOLLARS ($7,138.00).

Additionally, more than one thousand eight hundred fifty (1,850) pages of deposition testimony has been taken and more than three thousand (3,000) pages of exhibits have been attached in the State matter. Deposition cost in the State litigation exceeds SIX THOUSAND EIGHT HUNDRED FORTY FOUR DOLLARS ($6,844.00) and the appeal cost alone for the defendants is ONE THOUSAND THREE HUNDRED FORTY EIGHT DOLLARS ($1,348.00).

A special judge has been assigned to hear the State matter and two (2) trial dates have already been assigned. The first was lost because of discovery problems. The second was upsst at the request of the plaintiffs in order to seek a determination of a legal question concerning whether one partner

could sue another during the existence of the partnership for matters arising from the partnership. This question was decided adversely to the plaintiffs by the Third Circuit Court of Appeals for the State of Louisiana and is presently pending on an application for writs in the Supreme Court for the State of Louisiana. It is presently the subject of a Motion to Dismiss based upon lack of standing by the plaintiffs in the Federal matter. Thus, the potential for conflicting Federal and State judgments is already manifest.

In contrast, only a Petition, Answer, Motion for Standing Order, Motion for Abstention or Stay, Motion for New Trial and Motion to Dismiss existed in the Federal Court.

A determination of the underlying issues and allegations in the State or the Federal tribunal are surely binding on each other. The Defendants are not to be compelled to litigate the same issues on two (2) fronts. Plaintiffs initially chose to litigate their grievances in State Court. They have vigorously pursued that litigation and they should not be permitted to start over after so much time and effort has been expended.

The denial of our request to abstain or stay has resulted in a determination from which we cannot obtain adequate relief on appeal following judgment. It has finally and irreparable determined our right. Any policy against piecemeal appeals must yield to the ultimate goal of justice.

## ARGUMENT

DOES A POLICY AGAINST PIECEMEAL APPEALS OVERRIDE A POLICY AGAINST PIECEMEAL LITIGATION WHEN A DISTRICT COURT HAS BASED ITS REFUSAL TO ABSTAIN ON OBVIOUSLY ERRONEOUS DETERMINATIONS AND THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT HAS NEVER BEEN CONSIDERED?

The Fifth Circuit Court of Appeals denied our petition for rehearing on May 3, 1988. A denial of our alternative petition for permission to appeal and for writ of mandamus had been denied on April 6, 1988.

According to that denial which is attached as Exhibit D:

> Becnel has not overcome this Court's policy against piecemeal appeals . . .
>
> Becnel has not established that the resolution that the question present would materially advance the ultimate termination of the litigation.

If we are not allowed appellate review of the denial of abstention, we are finally and irreparably effected without benefit of a review. Prior Supreme Court decisions have recognized the plight of litigants in our position. It has announced that we are entitled to review through either the interlocutory appeal or writ of mandamus; **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 927 (1983); **Cohen v. Beneficial Industrial Loan Corporation,** 69 Supreme Court 1221 (1949).

A policy against piecemeal appeals must give way to justice. There is an even greater overriding policy which prohibits piecemeal litigation; **Colorado River Conservation District v. United States,** 96 Supreme Court 1236 (1976); **Moses H. Cone Memorial Hospital v. Mecury Construction,** 103 Supreme Court 927, 936 (1983).

The District Court determined that the State litigation and Federal litigation were based upon different causes of action; Exhibit B. It also determined that the Federal litigation was "founded exclusively upon RICO, a Federal statute with entirely different elements than State law breach of contract allegations"; Exhibit C. Both of these determinations are obviously incorrect when the State and Federal petitions are considered together.

The Supreme Court has announced the factors that are to be considered upon a Motion for Abstention. These factors were never considered. Our situation satisfies all of those factors.

The ruling of the Court of Appeals for the Fifth Circuit states that we ailed to show that a resolution of the question presented **would** materially dvance the ultimate termination of the litigation; Exhibit A. This is ubstantially different than what is required under 28 U.S.C. 1292 (b). We are equired only to show that the appellate decision "may" materially advance he ultimate termination of the litigation.

This goes hand and hand with the fourth factor of **Colorado River** vhich is the extend to which the Federal litigation has progressed. Obviously, State Court action which has progressed to the extent revealed in our xhibits should conclude prior to the Federal litigation which has only rogressed to the extent that an answer has been filed. The similarity between he two (2) claims will have the probable effect of concluding this matter ompletely under principles of res judicata and the prohibition of splitting laims found in Article 425 of the Louisiana Code of Civil Procedure. Once the arties are allowed to focus their attention in one (1) forum the ultimate ermination of the litigation may be materially advanced. This is all that is equired. The certificate supplied in compliance with 28 U.S.C. 1292(b) rovides the determination that a decision "may" advance termination of the itigation.

We are aware that the Fifth Circuit has a policy against piecemeal ppeals. The Supreme Court has recognized a policy against piecemeal itigation in cases previously cited herein. Allowing these cases to proceed ased upon the same issues at the same time is piecemeal litigation.

We would like to refer the Court to an early decision by the Fifth Circuit vhich condemned concurrent litigation; **PPG Industries v. Continental Oil Company,** 478 Fed.2d 674 (5th Cir. 1973). The Court states at page 680:

> Even when two (2) Courts of concurrent jurisdiction do not require control over an identifiable res, concurrent litigation of the same controversy is perceived as interference. Secondly, the quoted sentences show concern for economy of judicial time and disinclination to encourage duplication of effort . . .

A parallel consideration is the undesirability of imposing upon the itigants and witnesses the double burden of two (2) trials. Finally, the Courts ave recognized as generally "unwanted and highly undesirable (the) race by ach party to obtain a decision from the particular reacting most favorably to s position".

We suggest to this Honorable Court that the decision of the Appeals Court which denies our opportunity to obtain review of the lower Court ecision which finally and irreparably determines our rights is incorrect. The etermination by the District Court that the underlying issues are

substantially different and insinuating that the State litigation is based upon contract is erroneous. The factors set forth by the Supreme Court for reaching a proper determination upon a request for abstention or stay has never occurred. Furthermore, this mafter is directly appealable under 28 U.S. C. 1292(a)(1) as a refusal of injunctive relief.

WHEN PARTIES HAVE LITIGATED THE SAME ISSUES IN STATE COURT FOR TWO (2) YEARS RESULTING IN A RECORD OF ONE THOUSAND TWO HUNDRED NINETY THREE (1,293) PAGES; DEPOSITION TESTIMONY OF ONE THOUSAND EIGHT HUNDRED FIFTY (1,850) PAGES AND LITIGATION COST TO THE DEFENDANTS OF SIXTEEN THOUSAND DOLLARS ($16,000.00), IS ABSTENTION APPROPRIATE WHEN THE SAME ISSUES ARE PRESENTED IN FEDERAL DISTRICT COURT?

Originally, the District Court ruled on January 7, 1988. This ruling is appended hereto as Exhibit B. The Court stated that the claim before it was based upon RICO and thus the issues in the two (2) cases were substantially different. Therefore, abstention or stay was said to serve no purpose.

A Motion for New Trial was presented and a ruling was issued on January 25, 1988 with an amendment on January 27, 1988 providing the certificate required by 28 U.S.C. 1292(b); Exhibit C. That ruling recognizes that the State and Federal actions are based upon similar underlying transactions. However, the Court goes on to state that the Federal claims are based exclusively upon RICO and implies that the State claim is based upon breach of contract. Reading the Federal claim establishes that relief is sought under the Securities Act of 1934 and Rule 10b-5 (Count 1) the Securities Act of 1933 (Count 2); RICO (Count 3) and appended State claims (Counts 4 through 7); Exhibit F.

Reading the State claim establishes that allegations are made and relief is sought for Federal and State laws, breach of fiduciary duty, breach of contract, misrepresentations, omissions of material fact, manipulation, fraud, tort, violations of partnership articles, violations of corporate law, violations of consumer protection statutes and violations of securities statutes; paragraphs 8, 25-43; Exhibit E. Allegations of misrepresentations, false statements, misleading statements, omissions of material fact, diversion of income, manipulation of concealment are asserted in support of the relief claimed.

Relief cannot be obtained in the Federal matter without proof of exactly the same facts which must be proved to obtain relief in the State action.

The United States Court of Appeals for the Fifth Circuit has recognized that Federal Courts must give effect to State Court judgments determining issues which are reurged in RICO claims; **Muniz v. Mercantile Texas Credit Corporation,** 833 Fed.2d 541 (5th Cir. 1987). The litigation involved a usury claim. Counterclaims alleging usury were originally urged in the State Court. A subsequent action was commenced in Federal Court alleging RICO violations based on the same underlying transactions. Thereafter, judgment on the claims were entered in the State Court. A determination was made that the State judgment precluded litigation in the Federal action based on the Federal causes of action.

This case directly supports our position. Simply restyling the requested relief to set forth a RICO demand and specifically spelling out Federal securities demands does not result in a substantially different issue as decreed by the District Court. A substantial basis for a difference of opinion exists. The interest of the parties is not served by proceeding in two (2) forums when a determination of the underlying issues in one (1) forum will result in dismissal in the other. A waste of judicial recourses occurs. The litigation has now been going on in excess of two (2) years in the State Court and has progressed to the State Supreme Court. It should be allowed to proceed to determination without the parties having to litigate the same matter at the same time in Federal Court.

**Muniz** considered the effect of judgments under Texas law. The result is the same under Louisiana law. As stated in **Muniz:**

> It is well settled in determining that the preclusive effect of prior State Court judgments, the Federal Courts must apply the law of the state from which the judgment emerged.

Under Texas law, collateral estoppel was available and acted to prevent relitigation of an issue of ultimate fact which had been determined by final judgment. Thus, although RICO was not mentioned in the State suit, the petitioners could not relitigate the same facts in a Federal claim by simply relabeling the claim under RICO.

This is exactly what petitioners are attempting to do in the present litigation. They have been attempting to establish a claim based upon the same underlying transactions for two (2) years within the State system. They are aware that their attempts in this regard are not panning out. They are now attempting to hold out another claim in the event they are unsuccessful in their State claim. Louisiana Code of Civil Procedure Article 425 does not permit such an effort. That article states:

> An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof. If he brings an action to enforce only a portion of the obligation, and does not amend his pleading to demand the enforcement of the full obligation, he shall lose his right to enforce the remaining portion.

Once the State matter is tried, the petitioners are precluded from urging their RICO demands since the alleged basis for that demand was in existence and known to them during the pendency of the State action. This will preclude litigation of the claims in Federal Court based upon the same underlying transactions.

The plaintiffs will also be barred from relitigation by res judicata. L.R.S. 13:4231 provides:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded upon the same cause of action; the demand must be between the same parties and formed by them against each other in the same quality.

All of these elements are present. Petitioners are demanding damages, liquidation of the partnership, treble damages and withdrawal from the partnership. To the extent that the demands in the State litigation for liquidation and withdrawal are not made with specificity in the Federal litigation it is of no consequence because the validity of the demands made in Federal litigation will be determined along with the additional demands made in the State litigation. The underlying elements in the Federal litigation are fraud, misrepresentations, omissions of material fact, breach of fiduciary duty, etc. These are the same underlying elements of the State litigation. They must be proved to allow recovery in either claim. Judgment in one (1) forum must preclude judgment in the other.

The cause of action is the same. **Mitchell v. Bertolla,** 349 So.2d 287 (1976) had occasion to set forth the meaning of "cause of action". At page 291 it was determined that the plaintiffs' prior claims to set aside an option and the plaintiffs' present suit were brought upon different grounds (fraud/lesion) but constituted the same cause of action. The Court states that "cause of action" for res judicata purposes is the same as "cause"; page 292. "Cause" is defined as the material fact which is the basis for the right claimed; page 291. Obviously, the material facts in both the Federal and State litigation are the same and must be established for the plaintiffs to prevail in either litigation.

In **Rollins v. Dwyer,** 666 Fed.2d 141 (5th Cir. 1982), the Fifth Circuit Court of Appeals tells us that a State Court judgment contains the same res judicata effect as it would have in the Court that rendered it whether the State Court applied State or Federal laws; page 144. There, the plaintiffs were

seeking to recover attorney's fees under 15 U.S.C. 1635 alleging that recovery was not barred by denial of attorney's fees in a prior judgment in an action brought under 15 U.S.C. 1640 because the "cause" was not the same. This position was not accepted by the Court. Footnote 7 in that decision found at page 146 also states that a plaintiff cannot assert, in a second action, claims which are not asserted in the first. All issues presented by the pleadings and on which evidence was offered would be regarded as disposed of by final judgment.

The same conclusion should be reached herein. It does not matter that the plaintiffs have now decided to relabel their demand and seek to recover under RICO or specified Federal statutes. Simply changing the statutes or captions does not change the "cause" of the litigation. Violation of Federal laws is alleged in the State litigation.

The final element which must be satisfied for res judicata purposes is that the demand must be between the same parties. Merely looking at the two (2) petitions can leave no doubt that the demands brought in State Court consist of the same parties which are presently before the Federal Court. Those demands are also asserted in the same capacity. The fact that additional parties appear in the State action is of no consequence. **Building Engineering Services v. State of Louisiana,** 441 So.2d 417 (4th Cir. 1983) considered such a question. Prior litigation had been brought which included more parties than the litigation under consideration. This did not eliminate the application of res judicata. On page 421 the Court states that the critical inquiry was whether the parties in the second case had litigated the questions in the first. An absence of defendants who were present in the first suit but not in the second did not stop the application of res judicata.

Whether the plaintiffs have standing to bring the claims against their partners prior to dissolution and liquidation of the partnership is presently before the Supreme Court of the State of Louisiana upon an application for writs by the plaintiffs in the State matter. Standing is to be determined by the law of the state; Rule 17 of the Federal Rules of Civil Procedure. A Motion to Dismiss based upon lack of standing is presently before the District Court based upon the same claims as have previously been made in the State Court. The potential for conflicting judgments is already realized in this matter.

There is no difference in the issues in the two (2) petitions. The Federal claim is not based exclusively upon RICO and the State claim is surely not based upon breach of contract. These determinations are manifestly erroneous. No consideration has ever been given to the factors which are to be weighed to decide whether abstention is appropriate. We have simply been ignored because of a policy against "piecemeal appeals".

## ABSTENTION OR STAY IS APPROPRIATE

As the complexities and volume of litigation grew, the United States Supreme Court determined that reasons might exist for Federal Courts to decline an opportunity to decide a claim over which it had jurisdiction beyond those announced in **Pullman, Younger and Burford.** The case of **Colorado River Conservation District v. United States,** 96 Supreme Court 1236 (1976) was decided. Therein, the Court determined that a Federal Court could decline to hear a case when a similar action is pending in State Court after giving weight to the following factors:

1. Possibility of avoiding piecemeal litigation;
2. The convenience of the forum;
3. The order in which jurisdiction attached;
4. The extent to which Federal litigation has progressed;
5. The degree to which the rights and questions were particularly local.

Attention was given to each factor and abstention was found to be appropriate.

Then, the Court again considered the question in **Moses H. Cone Memorial Hospital v. Mercury Construction,** 103 Supreme Court 927 (1983). That Court reiterated that abstention was proper in **Colorado River** for "considerations of wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation", page 936. It was recognized that the foremost consideration in **Colorado River** was avoidance of piecemeal litigation. A priority element of jurisdiction was to be measured not in terms of time but by progress made in the two (2) actions; page 940. Finally, another factor was added which was whether the issue involved State or Federal law; page 941.

A proper analysis of our request for abstention guided by these decisions must lead to abstention. The claims are the same. Factual allegations are the same. Damages, treble damages, cost and attorney's fees and equitable relief are sought in each. Federal statutes are not mentioned by name in the State claim as they are in the Federal claim but the allegations and demands are couched in those terms. Assertions are made that the State statutes and Civil Code Articles permit the same relief as that asserted under the Federal statutes. Allowing the Federal matter to continue as the State matter progresses through trial and appeal can only result in piecemeal litigation.

As the State Court and Federal Court reach decisions upon certain questions and issues, those issues and questions must also be ruled upon in the other Court. The number of pleadings must progress in a logarithmic fashion as each decision creates issues of res judicata, collateral estoppel and issue preclusion; not to mention the problem of inconsistent verdicts and judgments.

Lafayette is the more convenient forum. All of the parties live in Lafayette. The partnership is in Lafayette. The evidence and most of the witnesses are in Lafayette. The misdeeds are allegedly committed in Lafayette. There is no connection with Opelousas whatsoever. Plaintiffs chose the forum. Initially they chose the District Court for the State of Louisiana in the Parish of Lafayette and were content to remain there for seventeen and one-half (17½) months. There has been no significant progress beyond answer in the Federal District Court. In comparison, our State Court file occupies three (3) storage drawers. One thousand two hundred ninety three (1,293) pages composed the record on appeal. Extensive appeal briefs have been written by both sides. There are one thousand eight hundred fifty (1,850) pages of deposition testimony and three thousand (3,000) pages of exhibits in the State action. Cost in the State action presently exceeds SIXTEEN THOUSAND DOLLARS ($16,000.00) without counting the cost of attorneys.

The rights asserted are alleged to be the rights of partners arising from the formation of the partnership and the partnership activities. These matters are particularly local. Partnership relation is governed by extensive articles found within the Louisiana Civil Code; Article 2801 et seq. As reflected in the State Court petition, the alleged acts are the subject enumerable articles and statutes.

The primary factors in **Colorado River** are all answered in favor of abstention. **Moses** added an additional factor of whether the issues involved State or Federal law. This litigation involves both. The plaintiffs alleged the violation of Federal Statutes in their State petition. It is proper to allow the matter to proceed on all issues in the State Court.

This claim was brought two (2) months after the matter was scheduled for trial in State Court. A special judge has been appointed in the State Court to try this case so there should be no difficulty in obtaining a quick trial date. The only difference in the proceedings is the caption of the demands. Plaintiffs herein are attempting to amend their pleadings at the eleventh hour in another forum. This should not be allowed.

It is also noted in **Moses** that the party's willingness to litigate similar questions in State Court should receive some attention. These plaintiffs cannot be heard to say that they are not willing to litigate these questions in State Court. They have been doing so for more than twenty four (24) months.

One other thought in **Moses** warrants discussion. At page 937, the Court again sets forth the ancient decree that the Court first exercising jurisdiction over property may exercise that jurisdiction to the exclusion of all other Courts. Jurisdiction over the partnership property has been first

exercised by the State District Court. The order at the foot of the petition; Exhibit E, establishes that the State Court has already decided to determine the fate of the property and the partnership. It has agreed to determine the appointment of a special master, liquidator, conservator and/or commissioner to manage the partnership if deemed appropriate following trial. The same is true for the appointment of an expert for the rendering of an accounting evaluation of the partnership if deemed appropriate following trial. It has been given jurisdiction over the partnership and the assets to determine the propriety of withdrawal by the plaintiffs and/or dissolution of the partnership. Also, the Court can appoint a liquidator to seek reimbursement of any improperly paid sums and direct a preferential distribution of assets if appropriate along with other equitable remedies. Jurisdiction over the property exist in the State Court.

This discussion also bears on the question of piecemeal litigation. If a determination is made allowing any of the requested reliefs, where does that leave the question in Federal Court? If the State Court enters judgment determining that the allegations of the plaintiffs are goundless, where does that leave the Federal Court if it has not abstained? According to the rulings issued by the District Court, it would appear that we would be required to relitigate those claims. We submit that our authorities have established that this is not proper and that abstention should be mandated.

Cases at the Appeal and District Court level also support our position. **Board of Education of Valley View v. Bosworth,** 713 Fed.2d 1316 (7th Cir. 1983) involved a question of whether a Federal Court in Illinois should abstain from hearing a claim that certain government officials had failed to distribute certain tax revenues plus interest to local public entities. The Court found that abstention was improper under considerations of "comity" or questions concerning clarity of State law, page 1320. However, abstention was proper because of the pendency of parallel State Court proceedings, page 1321. In reviewing the factors set forth in **Colorado River,** the Court states:

> "The decision to abstain does not rest on a mechanical check list but on a careful balancing of important factors as they apply in a particular case, with the balance weighted in favor of jurisdiction. The weight to be given any one factor may vary greatly from case to case depending on the particular setting".

We suggest that the extensive efforts in the State Court weigh heavily in favor of abstention and first jurisdiction over the property mandates it.

In **Oler v. Trustees of California State Universities and Colleges,** 80 FRD 319, (California, 1978), the State Court proceeding had been filed one (1) year prior to the Federal proceedings. It had been actively prosecuted and discovery was well under way. At page 321, it is determined that when the plaintiff initially makes the choice and raises Federal questions in State Court,

he cannot be said to be deprived of any right to a Federal Court. Herein, the plaintiffs made their choice to litigate the Federal claims in the State system. They should be required to continue in that single effort rather than divide their efforts after two (2) years. The Federal claims were no less existent at the time they made their choice. The language of the petition reveals undeniably that the petitioners must have been aware of Federal claims.

The parties defendant in the State action are not exactly the same as the parties defendant in the Federal action. However, plaintiffs allege that all the parties in the State action were indispensable for complete relief (paragraph 5 of the State petition). The more complete relief is available in the State Court. To the extent that there is any question as to the permissibility of abstention when there is a difference in the parties, **Gilbane Building Company v. Nemours Foundation,** 568 Fed. Supp. 1085 (District Court of Delaware, 1983) holds at page 1089:

> The criteria for determining abstention does not require that the actions be identical. The actions may involve two (2) different parties.

Of course, if this Court does not feel that the Federal claims are asserted in the State action, that is not necessary. **Railroad Commission v. Pullman Company,** 61 Supreme Court 634 (1941) established that it is not even necessary for a State action to be pending for abstention to be appropriate. A similiar result is reached in **Moos v. Wells,** 585 Fed. Supp. 1348, 1350 (District Court of New York, 1984).

**North American Van Lines v. State Board of Tax Commissioners,** 590 Fed. Supp. 311 (District Court of Indiana, 1984) arose from a challenge to the constitutionality of a change in the Indiana tax laws. The Court raised the question of abstention on its own motion and discussed the four types; **Pullman, Burford, Younger** and **Colorado River.** The parties in the Federal and State litigation were not the same and a question over a State law was on appeal, page 314. The same is true here.

On pages 315 and 317, a stay was found to be appropriate based on wise judicial administration of judicial resources. Courts could also consider the vexatious nature of the suit and determining the propriety of abstention under **Colorado River.** This is the fourth time that the plaintiffs herein have sued the defendants herein. Surely, this must rise to the level of vexatiousness.

A claim arose from an attempted conversion of a building from a leased premises to a cooperative ownership in **Moos v. Wells,** 585 Fed. Supp. 1348 (District Court of New York, 1984). Suit had been commenced in the State Court in 1981 and Federal Court in 1984. Abstention was found to be proper under **Burford v. Sun Oil,** 63 Supreme Court 1098 (1943) because the Federal Court should abstain from deciding State law issues of vital concern

to the State. The rights of the parties turned on State and local law with which the State Courts were most familiar. The housing law was controlled by comprehensive State legislation, page 1350. Here the Louisiana Partnership Law, Corporate Law, Tort Law and Fiduciary Laws are very extensive.

In the final paragraph on page 1350, the Court notes that abstention is proper even where the Federal claims are not expressly raised in the State action.

**Cristina v. Department of State of New York,** 417 Fed. Supp. 1012 (New York, 1976) arose when the plaintiff brought a claim in Federal Court alleging violation of his rights under 42 U.S.C. 1985 and the Fourteenth Amendment. Abstention was found to be appropriate even where there is a specific statutory directive of Federal jurisdiction. This is especially true where the Court is presented with a difficult question of State law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, page 1015. The questions involving partnership law herein are certainly difficult. That question has been ruled upon in the State District Court and twice by the Third Circuit Court of Appeals and is now again waiting determination in the Louisiana State Supreme Court of Appeals. Obviously, the regulatory scheme for partnerships in Louisiana is of substantial public import and reaches far beyond the result in this particular case.

It is not necessary that the issues in each case be exactly the same. **ACS, Inc. v. Aetna Casualty and Surety Company,** 544 Fed. Supp. 128 (District Court of Pennsylvania, 1982) arose from issues relating to the interpretation of provisions within an insurance policy. A similar case was docketed in the State of California, page 130. In resisting abstention, the third party plaintiff argued that the same issues and parties were not present in California. The Court responded that "so long as there is substantial similarity between the State and Federal action, the Court may freely exercise its discretion and dismiss the complaint", page 131.

**Arkwright-Boston Manufacturers Mutual v. City of New York,** 762 Fed. 2d 205 (2nd Cir. 1985) was a diversity action asserting surrogation claims. The case of **Colorado River** is noted at page 210 with an observation that the decision of abstention is within the sound discretion of the Court. An important discussion is found at page 211 recognizing the potential for piecemeal litigation in that (a) many claims were pending in the State Court involving more parties than those presently in the Federal Court; (b) the defendant would be forced to defend complex litigation on two fronts without a stay in the Federal matter; (c) there was the possibility of inconsistent verdicts and the breeding of added litigation because of claims of res judicata and issue preclusion. The Court states:

> The existence of such concurrent proceeding creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the issues first which would be prejudicial, to say the least, to reasoned decision making by either forum . . . maintaining virtually identical suits in two forums would waste judicial resources and invite duplicative effort.

The next question was how much effort had been made in each forum and which forum provides the substantive rule to determine the merits. It was determined that a serious question of whether New York law allowed a party to recover for a tort without physical injury existing. Besides the ability of one partner to sue another at the present time, a serious question also exists in this litigation as to whether the partners have standing to assert the claims which they are attempting to assert.

The case of **Lary v. Ansari,** 817 Fed. 2d 1521 (11th Cir. 1987) arose in the context of multi-suit litigation. The plaintiff had originally sued in 1983 alleging fraud and breach of agreement between the parties. Judgment was entered in favor of the defendant. The petitioner then sued in 1985 alleging RICO violations. On page 1523, the Court notes that res judicata bars litigants from relitigating issues which could have been raised in the prior action. This is directly contrary to the implications of the rulings issued in the District Court below. The 11th Circuit goes on to state:

> Although styled as a RICO claim, the complaint relies on the same misconduct by **Ansari** as did the prior suit. This action is barred by res judicata.

Claim and issue preclusion were considered in **HMK Corporation v. Walsey,** 637 Fed. Supp. 710 (District Court of Virginia). There, HMK had first filed a series of suits in State Court. Then, a Federal claim was filed. Next, a Federal claim was filed alleging conspiracy to take property, page 714. It was decided that the traditional concepts of claim preclusion and issue preclusion required dismissal of the RICO claim. Full faith and credit had to be given to the judgment of the Virginia Court, page 716. We are told:

> Final judgment on the merits preclude the parties or their privies from relitigating issues that were or could have been brought in the prior action.

At page 717 the Court notes that there is concurrent jurisdiction over RICO claims in State and Federal Courts. Footnote 5 in the decision notes the legion of cases granting preclusive effects to prior judgments and RICO claims.

Certain of the above cited cases involve claims wherein jurisdiction was based on diversity. However, the decision concerning abstention should be the same in Federal question matters. The litigant cannot be relegated to

State Court on a lesser showing than a plaintiff alleging a Federal question case; **Shomber By Shomber v. Jule Companies, Inc.**, 614 Fed. Supp. 210, 218 (District Court of Illinois).

A proper analysis of these considerations must result in a decision to abstain in the present matter.

There has been no question within either the State or the Federal system concerning the ability of State Courts to litigate claims under 15 U.S.C. 771(2). However, the jurisdictional grant in 15 U.S.C. 78(j) is exclusive. Still, this should not present any difficulty in determining that this case is appropriate for abstention or stay.

The Ninth Circuit confronted this situation in **Weiner v. Shearson,** 521 Fed. 2d 817 (9th Cir. 1975). The District Court had determined that abstention was proper in view of a virtually identical State Court action but had totally dismissed the Federal claim rather than stay. The Court of Appeals felt that total dismissal was improper and that the action should have been stayed pending the outcome of State litigation; page 821. In the course of the decision, a question arose over the ability of the State Court to pass upon claims under the Securities Acts. Those claims presented under Section 77 of Title 15 were no problem. However, claims were also made under 15 U.S.C. Section 78(j) and Rule 10b-5. At page 822, the Court determines that although State Court may not have concurrent jurisdiction over the claims under the 1934 Act, a stay would not be inappropriate. Although the State Court did not have concurrent jurisdiction, it did have jurisdiction over the 1933 Act claims and in ruling on the issues under that provision, it would necessarily resolve the issues in the 1934 Act claim. The same would be true even if State Courts do not have concurrent RICO jurisdiction.

The Second Circuit has reached the same result in **Klein v. Walston,** 432 Fed. 2d 936 (2nd Cir. 1970). Therein, the State Court action involved only claims of common law fraud. Federal claim is brought under the Securities Act of 1934. At page 937 the Court states that the resolution of the State claim issues may well be dispositive of the Federal claims. The fifth Circuit has noted that the great weight of authority is in favor of concurrent jurisdiction over RICO claims in State and Federal Court; **Dubroff v. Dubroff,** 833 Fed. 2d 557 (5th Cir. 1987).

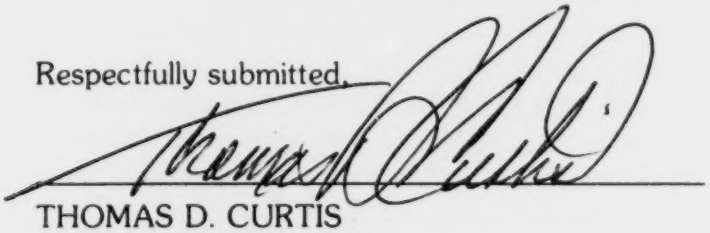
## CONCLUSION

When a plaintiff brings a claim in the State Court and actively litigates that claim for seventeen and one-half (17½) months prior to bringing a claim in State Court which has the same underlying basis as the State Court claim, abstention is appropriate. A policy against piecemeal appeals must give way to justice when and interlocutory decision in the District Court finally determines the rights of a party which cannot be adequately addressed on appeal.

This matter falls within that class of case which is appropriate for abstention.

It is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit must be reversed and abstention in this matter must be mandated during the continuaton of the State litigation.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Original Brief on behalf of Thomas Becnel and The Becnel Company, has this day been placed in the United States Mail, postage prepaid and properly addressed to:

Mr. Richard Stanley
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Lafayette, Louisiana this 29th day of July, 1988.

THOMAS D. CURTIS